ERIK A. OLSON, eolson@djplaw.com (State Bar No. 8479)
CLINTON E. DUKE, cduke@djplaw.com (State Bar No. 9784)
BURTON G. DAVIS, bdavis@djplaw.com (State Bar No. 12071)
Attorneys for WellBalance, LLC
DURHAM JONES & PINEGAR, P.C.
111 East Broadway, Suite 900
Salt Lake City, UT 84111
(801) 415-3000

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

WELLBALANCE, LLC, a North Carolina limited liability company, Plaintiff, v. ASPEN EDUCATION GROUP, INC., a California corporation, Defendant.	**COMPLAINT FOR DECLARATORY JUDGMENT** Civil No. 2:11-cv-00361-BCW Magistrate Judge: Brooke C. Wells **JURY TRIAL DEMANDED**

Plaintiff WellBalance, LLC ("WellBalance" or "Plaintiff"), by and through its counsel, hereby brings this Complaint for Declaratory Judgment and Jury Demand against Defendant Aspen Education Group, Inc. ("Aspen" or "Defendant") and alleges as follows:

Nature of the Action

1. This is an action for declaratory judgment of noninfringement of Defendant's alleged trademark rights in the word "wellspring" pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and 15 U.S.C. § 1051 *et seq.* This action is also based on Defendant's tortious interference with WellBalance's contractual relations and economic opportunity in violation of applicable Utah law.

Parties, Jurisdiction and Venue

2. Plaintiff WellBalance, LLC is a North Carolina limited liability company with its headquarters at 906 Woodvine Rd., Asheville, North Carolina 28803. WellBalance operates two weight loss summer camps under the trademark "WellBalance."

3. On information and belief, defendant Aspen Education Group, Inc. is a California corporation with its corporate headquarters at 17777 Center Court Drive, Suite 300, Cerritos, California 90703. On information and belief, Aspen operates several weight loss camps under the trademark "Wellspring."

4. This Court has subject matter jurisdiction over the Claims asserted in this Complaint pursuant to 28 U.S.C. §§ 1331, 1338, and 15 U.S.C. §§ 1114 and 1125. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400.

5. This Court also has general personal jurisdiction over Aspen because its contacts with Utah are substantial, continuous, and systematic.

General Allegations

6. WellBalance is in the business of designing and operating fitness and weight loss summer camps. One of WellBalance's camps is located on the University of California Santa Cruz campus. The other of WellBallance's camps is located at the Christchurch boarding school campus in Virginia.

7. WellBalance currently uses the mark "WellBalance" in connection with its design and operation of fitness and weight loss summer camps.

8. On information and belief, Aspen is in the business of, among many other things, operating weight loss camps.

9. On information and belief, Aspen is the owner of U.S. Trademark Registration No. 3,130,657 for the word "wellspring" in connection with "[t]reatment and counseling services for weight loss and eating disorders for children, and young adults, offered through camps, outdoor activities and weight loss treatment facilities." A true and correct printout for U.S. Trademark Registration No. 3,130,657 is filed herewith as Exhibit 1.

10. On information and belief, Aspen is the owner of U.S. Trademark Registration No. 3,536,417 for the word "wellspring" in connection with "[e]ducational services, namely, conducting classes, seminars, workshops and educational conferences to educate youth and adults concerning nutrition, weight loss, obesity, eating habits, and healthy lifestyles through a proper diet program, activity management, and training on core self-regulatory behaviors required for long-term weight control in residential boarding schools, after-school programs, camps and retreats, but specifically excluding retail grocery stores" and "[p]sychological and nutrition counseling, namely, comprehensive cognitive-behavioral therapy concerning nutrition, weight loss, obesity, eating habits, and healthy lifestyles in residential boarding schools, after-school programs, camps and retreats, but specifically excluding retail grocery stores." A true and correct printout for U.S. Trademark Registration No. 3,536,417 is filed herewith as Exhibit 2.

11. On information and belief, Aspen has not registered the word "WellBalance" as a trademark.

12. On information and belief, Aspen does not use the word "WellBalance" in connection with its weight loss camps or in connection with any other products or services offered by Aspen.

13. On April 12, 2011, counsel for Aspen sent a cease and desist letter to Mr. John

Gordon of WellBalance. This letter accused Mr. Gordon of infringing Aspen's "trademarks and other intellectual property, violat[ing] California's unfair competition laws, and breach[ing a] confidentiality agreement." This letter also threatened the filing of "an action in United States District Court for trademark infringement, unfair competition and breach of confidentiality agreement, asking for preliminary injunction, a permanent injunction, actual damages, punitive damages and attorney's fees." A true and correct copy of this letter is filed herewith as Exhibit 3.

14. On information and belief, on or around April 14, 2011, counsel for Aspen also sent correspondence to WellBalance's landlords at the University of California Santa Cruz and at Christchurch School threatening to hold these landlords liable for "contributory trademark infringement for assisting WellBalance and providing WellBalance with facilities enabling it to infringe Wellspring's trademarks." A true and correct copy of the correspondence from counsel for Aspen to Christchurch School is filed herewith as Exhibit 4.

15. As a result of the aforementioned correspondence, WellBalance has a reasonable fear and apprehension that Aspen will bring suit against WellBalance alleging, at least, infringement of Aspen's trademark rights in the word "wellspring."

16. Accordingly, an actual and judiciable controversy exists between the parties.

17. WellBalance asserts that there is no likelihood of confusion between the parties' respective uses of the words "WellBalance" and "wellspring" for various reasons including, but not limited to, the weakness of the "wellspring" trademark, the differences between the "wellspring" and "WellBalance" trademarks, the differences in the uses of the "wellspring" and "WellBalance" trademarks, the differences in the parties' marketing channels, a lack of actual

consumer confusion, and WellBalance's intent in adopting its "WellBalance" trademark.

18. Accordingly, WellBalance contends that it is entitled to an order declaring that its use of the word "WellBalance" does not and will not infringe Aspen's "wellspring" trademark.

19. WellBalance also contends that it does not unfairly compete with Aspen and asserts that it is entitled to an order so declaring.

FIRST CLAIM FOR RELIEF
DECLARATION OF NONINFRINGEMENT OF TRADEMARK RIGHTS

20. WellBalance incorporates into this Claim all of the allegations of the prior paragraphs of this Complaint.

21. WellBalance has a reasonable fear and apprehension that it will be sued for trademark infringement and that an actual and justiciable controversy exists between the parties.

22. WellBalance asserts that there is no likelihood of confusion between the parties' respective uses of the words "WellBalance" and "wellspring" for various reasons including, but not limited to, the weakness of the "wellspring" trademark, the differences between the "wellspring" and "WellBalance" trademarks, the differences in the uses of the "wellspring" and "WellBalance" trademarks, the differences in the parties' marketing channels, a lack of actual consumer confusion, and WellBalance's intent in adopting its "WellBalance" trademark.

23. Accordingly, WellBalance is entitled to an order declaring that its use of the "WellBalance" trademark in the United States does not and will not infringe Aspens's "wellspring" trademark.

SECOND CLAIM FOR RELIEF
DECLARATION OF NO UNFAIR COMPETITION

24. WellBalance incorporates into this Claim all of the allegations of the prior

paragraphs of this Complaint.

25. WellBalance has a reasonable fear and apprehension that it will be sued for unfair competition and that an actual and justiciable controversy exists between the parties.

26. WellBalance asserts that its use of its "WellBalance" trademark is not likely to deceive or mislead prospective customers of the products and services offered under the "WellBalance" trademark into believing that these are the products and services of Aspen or that such products and services are produced, sponsored, or approved by Aspen. WellBalance also asserts that its use of its "WellBalance" trademark is not likely to otherwise cause any commercial detriment to Aspen.

27. WellBalance asserts that it does not unfairly compete with Aspen by virtue of its use of its "WellBalance" trademark.

28. Accordingly, WellBalance is entitled to an order declaring that it does not unfairly compete with Aspen by virtue of its use of its "WellBalance" trademark in the United States.

THIRD CLAIM FOR RELIEF
TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS AND ECONOMIC OPPORTUNITY

29. WellBalance incorporates into this Claim all of the allegations of the prior paragraphs of this Complaint.

30. A contractual relationship exists between WellBalance and the two landlords who have agreed and contracted to host WellBalance's weight loss summer camps.

31. A contractual relationship exists between WellBalance and those customers who have purchased reservations for one of WellBalance's weight loss summer camps.

32. A potential economic opportunity exists for WellBalance with regard to

customers who may be considering purchasing reservations for one of WellBalance's weight loss summer camps.

33. On information and belief, Aspen became aware of WellBalance's contractual relationships with WellBalance's landlords.

34. Aspen, without privilege, intentionally and unjustifiably interfered with WellBalance's existing contractual relations, and with its potential economic opportunities by unjustifiably threatening to hold WellBalance's landlords liable for contributory trademark infringement if they fulfilled their contractual obligations to host WellBalance's weight loss camps.

35. Aspen's interference and wrongful conduct was undertaken with an improper purpose, in that the interference and wrongful conduct were maliciously motivated, based on spite and a desire to harm WellBalance, and Aspen's ill will predominated over all legitimate economic motivations.

36. Aspen's interference and wrongful conduct was undertaken by improper means, in that the means by which Aspen interfered were contrary to statutory, regulatory and/or common law and/or violated an established standard of a trade or profession.

37. As a result of Aspen's tortuous interference with WellBalance's contractual relations and prospective economic opportunity as alleged herein, WellBalance has suffered irreparable harm to its business, goodwill and reputation as well as economic harm and other monetary damages.

38. Unless Aspen is restrained and enjoined by this Court from engaging in further tortuous interference with WellBalance's contractual relations and prospective economic

opportunities, WellBalance will continue to suffer irreparable harm to its business, goodwill and reputation, as well as monetary damages from lost revenue in the future.

PRAYER FOR RELIEF

WHEREFORE, WellBalance prays for the following relief as against Aspen:

1. A judgment declaring that WellBalance's use of its "WellBalance" trademark does not and will not infringe on any of Aspen's trademark rights;

2. A judgment declaring that WellBalance's use of its "WellBalance" trademark does not and will not constitute unfair competition with Aspen;

3. A temporary restraining order, a preliminary injunction and a permanent injunction restraining and enjoining Aspen, and its officers, directors, employees, agents, and all those in privity, concert, or participation with Aspen, from tortiously interfering with WellBalance's contractual relations and prospective economic opportunities;

4. An award of damages in an amount equal to WellBalance's lost sales and lost revenues resulting from Aspen's tortious interference with WellBalance's contractual relations and prospective economic opportunities;

5. That Aspen be ordered to pay all costs associated with this action; and

6. That WellBalance be granted such other and additional relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, WellBalance hereby demands a trial by jury on all issues and claims so triable.

DATED: April 19, 2011.

DURHAM JONES & PINEGAR, P.C.

/Clinton E. Duke/
Erik A. Olson
Clinton E. Duke
Burton G. Davis

Attorneys for WellBalance, LLC